

CIVIL RIGHTS COMMISSION

STATE OF HAWAII

WILLIAM D. HOSHIJO,
Executive Director, on behalf
of the complaint filed by
BRUCE PIED,

and

BRUCE PIED,

Complainant-Intervenor,

vs.

ALOHA ISLANDAIR, INC.,

Respondent.

WILLIAM D. HOSHIJO,
Executive Director, on behalf
of the complaint filed by
BRUCE PIED,

and

BRUCE PIED,

Complainant-Intervenor,

vs.

ALOHA ISLANDAIR, INC.,

Respondent.

) Docket No. 98-007-E-D

) HEARINGS EXAMINER'S
) SUPPLEMENTAL FINDINGS OF
) FACT, CONCLUSIONS OF LAW
) AND RECOMMENDED ORDER

) Consolidated with
) Docket No. 98-008-E-D-RET

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CIVIL RIGHTS COMMISSION
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HEARINGS EXAMINER'S SUPPLEMENTAL FINDINGS OF
FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER

On May 28, 1999 this Hearings Examiner issued her Findings of Fact, Conclusions of Law and Recommended Order in this case. On June 3, 1999 the Commission issued an order sua sponte remanding this case to determine the specific amounts of back pay, front pay,

punitive damages and attorneys' fees and costs to be awarded to Complainant. On June 30, 1999 Complainant filed his application for statutory award of attorneys' fees. On September 3, 1999 the Executive Director filed its memorandum on punitive damages and attorneys' fees and costs and Complainant filed his memorandum regarding calculation of front pay, back pay and punitive damages. On September 10, 1999 Respondent filed its memorandum regarding damage issues. A hearing on the calculation of back pay and front pay was held on October 4, 1999. In attendance were: Enforcement Attorney Cheryl Tipton on behalf of the Executive Director; David F. Simons, Esq. on behalf of Complainant; and Richard M. Rand, Esq. on behalf of Respondent. On November 17, 1999 Complainant and Respondent filed a Stipulation Regarding Complainant's Bruce A. Pied's Correct Salary and Benefits.

Having reviewed and considered the evidence and arguments presented at the hearing together with the entire record of these proceedings, this Hearings Examiner hereby renders the following supplemental findings of fact, conclusions of law and recommended order.

II. FINDINGS OF FACT¹

35. Complainant's income and the value of the benefits he received from August 31, 1990 to October 31, 1999 amount to \$110,710. This amount is calculated as follows:

<u>period</u>	<u>earnings</u>	<u>benefits</u>
8-31-90 to 12-31-90	2,784	0
1-1-91 to 12-31-91	2,784	0
1-1-92 to 12-31-92	12,588	0
1-1-93 to 12-31-93	2,408	512
1-1-94 to 12-31-94	9,114	2,279
1-1-95 to 12-31-95	2,533	0
1-1-96 to 12-31-96	17,322	0
1-1-97 to 12-31-97	5,076	0
1-1-98 to 12-31-98	40,199	0
1-1-99 to 10-31-99	<u>13,111</u>	<u>0</u>
totals:	107,919	2,791

(Tr. at 195-196, 198-200; Exs. 55, 56, 57, 58, 59, 60, 61, 62; Stipulation Regarding Complainant Bruce A. Pied's Correct Pay and Benefits)

36. Because Complainant lives on the Big Island and has family on the mainland, he would have used jump seat and flight pass privileges given to employees of IslandAir or any national air line. These jump seat and flight pass privileges have a value of \$10,560 per year. (Tr. at 199)

37. Because Complainant lives in Hawaii, he would have sought and advanced to a first officer position with a national air line located in Hawaii, such as Aloha Air Lines. (Tr. at 34, 206)

¹ To the extent that the following findings of fact also contain conclusions of law, they shall be deemed incorporated into the conclusions of law.

38. The income Complainant would have earned and the value of benefits he would have received if he were a first officer with Respondent IslandAir from August 31, 1990 through August 31, 1995, a captain with IslandAir from August 31, 1995 to August 31, 1998 and a first officer with Aloha Airlines from August 31, 1998 to October 31, 1999 amount to \$394,860. This amount is calculated as follows:

<u>period</u>	<u>earnings</u>	<u>benefits</u>
8-31-90 to 12-31-90	4,815	6,609
1-1-91 to 12-31-91	14,493	13,617
1-1-92 to 12-31-92	16,065	13,745
1-1-93 to 12-31-93	17,692	13,879
1-1-94 to 12-31-94	21,849	14,220
1-1-95 to 8-31-95	15,628	9,140
8-31-95 to 12-31-95	13,065	4,500
1-1-96 to 12-31-96	39,194	15,642
1-1-97 to 12-31-97	38,256	15,565
1-1-98 to 8-31-98	25,504	9,627
8-31-98 to 12-31-98	9,200	4,719*
1-1-99 to 10-31-99	<u>42,213</u>	<u>15,618*</u>
totals:	257,979	136,881

* does not include per diem because Complainant lives in Hawaii
(Exs. 54, 91, NN)

39. Complainant's past losses in earnings and benefits are therefore as follows:

<u>period</u>	<u>earnings</u>	<u>benefits</u>
8-31-90 to 12-31-90	2,031	6,609
1-1-91 to 12-31-91	11,709	13,617
1-1-92 to 12-31-92	3,477	13,745
1-1-93 to 12-31-93	15,284	13,367
1-1-94 to 12-31-94	12,735	11,941
1-1-95 to 12-31-95	26,160	13,640
1-1-96 to 12-31-96	21,872	15,642
1-1-97 to 12-31-97	33,180	15,565
1-1-98 to 12-31-98	-5,495	14,346
1-1-99 to 10-31-99	29,102	15,618

40. The amount Complainant would earn and the benefits he would receive (not including per diem) if he were a first officer with Aloha Air Lines from January 1, 2000 until he reaches age 60 are as follows:

<u>period</u>	<u>earnings</u>	<u>benefits</u>
11-1-99 to 12-31-99	8,442	3,124
1-1-00 to 12-31-00	61,262	20,074
1-1-01 to 12-31-01	71,700	20,894
1-1-02 to 12-31-02	81,690	21,493
1-1-03 to 12-31-03	87,743	21,857
1-1-04 to 12-31-04	88,713	21,953
1-1-05 to 12-31-05	89,311	22,951
1-1-06 to 12-31-06	89,939	21,988
1-1-07 to 12-31-07	90,571	22,026
1-1-08 to 12-31-08	91,234	22,104
1-1-99 to 12-31-99	92,053	22,115
1-1-10 to 12-31-10	92,053	22,115
1-1-11 to 12-31-11	92,053	22,115
1-1-12 to 12-31-12	92,053	22,153

(Ex. 1 to Stipulation Regarding Complainant Bruce A. Pied's Correct Pay and Benefits)

III. CONCLUSIONS OF LAW²

A. Back Pay

Complainant's income and the value of the benefits he received from August 31, 1990 through October 31, 1999 was \$110,710. The amount he would have earned as a first officer and captain with IslandAir, and as a first officer with Aloha Air Lines and the value of benefits he would have received during this same period

² To the extent that the following conclusions of law also contain findings of fact, they shall be deemed incorporated into the findings of fact.

would have been \$394.860. Thus, his pre-tax loss amount for this period is \$284,150. Federal and state income taxes on Complainant's earnings and retirement benefit losses should be calculated based on the yearly figures provided in FOF No. 39³ and should be deducted from \$284.150 to determine Complainant's total after tax loss amount.

Prejudgment interest should be calculated based on Complainant's after tax loss amounts for each year.

Federal and state income taxes should be calculated on the sum of Complainant's total after tax loss amount and his prejudgment interest amount.

I therefore determine that Respondent should be ordered to pay Complainant back pay consisting of: a) Complainant's total after tax loss amount; b) prejudgment interest based on Complainant's after tax loss amounts for each year; and c) federal and state income taxes on the sum of (a) and (b) above (Complainant's total after tax loss amount and prejudgment interest amount).

B. Front Pay

In my May 28, 1999 recommended order, I concluded that because Complainant would have become a first officer with a national airline by August 31, 1998, Respondent should be ordered to pay Complainant the difference between what he would have earned as a

³ Some of the earnings and benefit figures used by Complainant's expert witness, Dr. Thomas Loudat, in his reports are incorrect. In addition, specific retirement benefit amounts for each year were not provided. Therefore this Hearings Examiner is unable to make the tax calculations on these amounts.

first officer with a national airline and what he earns as a first officer with IslandAir until Complainant obtains a first officer position with a national airline or until he reaches age 60. Because the end of this front pay period is speculative, it is not possible to calculate a lump sum amount at this time.

I therefore determine that Respondent should be ordered to pay Complainant a supplemental wage amounting to the difference between what he would have earned and the value of the benefits he would have received as a first officer with Aloha Air Lines, as detailed in Finding of Fact No. 40 above, and what he earns and the value of the benefits he receives as a first officer with IslandAir until Complainant obtains a first officer position with a national airline or until he reaches age 60. These supplemental amounts may be paid on a monthly basis.

C. Punitive Damages

In determining the amount of punitive damages, this Commission has considered the following factors: 1) the degree of malice and reprehensibility of the respondent's conduct; 2) the respondent's financial situation; and 3) the amount of punitive damages which will have a deterrent effect on the respondent in light of his or her financial situation. See, Tseu/Gould v. Simich et. al, Docket No. 95-012-E-SH (October 29, 1995); Beerman v. Toro Mfg. Co., 1 Haw. App. 111, 119 (1980); Kang v. Harrington, 59 Haw. 652, 663-664 (1978).

In light of Respondent IslandAir's deliberate attempt to cover up and conceal its discriminatory practices, its financial situation, particularly the past and most recent stockholder's equity in the corporation (see, Ex. 2 attached to Complainant's Memorandum Regarding Calculating of Front Pay, Back Pay and Punitive Damages, placed under seal by protective order), and the amount of punitive damages that will deter IslandAir and others from such conduct in the future, I determine that Complainant should be awarded punitive damages in the amount of \$100,000.

D. Attorneys' Fees and Costs

Complainant seeks \$22,225.10 in costs. However, Complainant lists fees from Air Inc. (\$1,500) and Michael Conroy (\$750) without explaining the purpose or need for these consultants, who did not testify or submit documents during the hearing. I therefore decline to award these costs. In addition, I will decrease the award for copying costs by 75%. I fail to see why, in addition to the exhibits made for the hearing, Complainant incurred copying costs for 10,362 pages. I also feel that a rate beyond 10 cents per copy is excessive. Complainant's costs are therefore reduced by \$3,804. Complainant should therefore be awarded costs of \$18,421.

Complainant also seeks attorneys fees in the amount of \$114,213.91. I recommend that the fees sought be reduced by \$17,545.

Complainant seeks attorneys fees for 5.85 hours spent in conciliation. H.R.S. § 368-17(a)(9) allows fees only for maintaining an action before the Commission; this does not include conciliation. I would also reduce Complainant's fees by the following hours:

David Simons

- 2.7 hours for drafting Complainant's petition for declaratory relief
- 1.0 hour for drafting motion to intervene
- .6 hours for review and signing a stipulation of time for filing a brief to the circuit court
- 3.2 hours for drafting petition for declaratory relief (listed twice)
- .7 hours for drafting a letter to the Hearings Examiner
- 12.0 hours for writing a memo in opposition to Respondent's motion for summary judgment
- 8.7 hours for research/writing the post hearing brief
- 2.0 hours for writing a memo responding to Respondent's motion to reopen hearing
- 1.7 hours for writing Complainant's supplemental post-hearing brief
- 6.0 hours researching punitive damages issues

Matthew Viola

10.6 hours research/writing on Complainant's motion for summary judgment

K. Bartlett Durand (paralegal)

64.4 hours attending hearings

Therefore, the fees to be awarded should be $\$92,100 \times 4.166\%$ general excise tax = $\$95,936.88$.

Because this amount is less than the amount of punitive damages awarded, Complainant should not be awarded any attorneys' fees. See, Lee v. Aiu, 85 Haw. 19, 35 (1997); Romero v. Hariri, 80

Haw. 450, 459-460 (1996) (attorneys' fees cannot be awarded in addition to punitive damages; rather they must constitute the whole of the punitive damages award or be accounted for as a portion of the total punitive damage award).

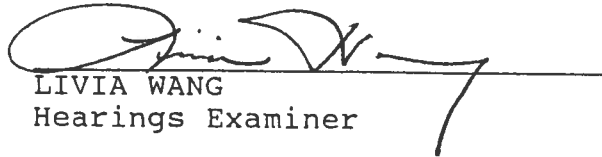
IV. RECOMMENDED ORDER

Based on the matters set forth above, I recommend that pursuant to H.R.S. § 368-17, the Commission should order:

1. Respondent to pay Complainant back pay in the amount to be calculated as set forth in COL III.A.
2. Respondent to pay Complainant a supplemental salary, the difference between his salary and the value of his benefits as a first officer with IslandAir and what he would earn and the value of benefits he would receive as a first officer with Aloha Air Lines until Complainant obtains a first officer position with a national airline or until he reaches age 60.
3. Respondent to pay Complainant punitive damages in the amount of \$100,000.
4. Respondent to pay Complainant his costs in the amount of \$18,421.

Dated: Honolulu, Hawaii, November 29, 1999.

HAWAII CIVIL RIGHTS COMMISSION



LIVIA WANG
Hearings Examiner

Copies sent to:

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